IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 311

MURRAY B. McLEOD, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,

Petitioner,

vs.

J. E. DILWORTH COMPANY AND REICHMAN-CROSBY COMPANY,

Respondents,

SEPARATE REPLY BRIEF ON BEHALF OF RESPONDENT, J. E. DILWORTH COMPANY.

ALLAN DAVIS,
Counsel for Respondent.

INDEX
SUBJECT INDEX

TABLE OF CASES CITED

TABLE OF CASES (Continued)

STATUTE CITED

ACTS CITED

RULE CITED

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To THE HONORABLE HARLAN F. STONE, *Chief Justice, and the Honorable Associate Justices, of the Supreme Court of the United States:*

Summary of Issues Involved.

Petitioner assigns two reasons for allowance of petition for Writ of Certiorari. First, the decision of the Supreme Court of Arkansas is upon an important question of Federal Law which has not been directly passed upon by this Court. Second, the decision of the Supreme Court of Arkansas is in conflict with principles established by prior

decisions of this Court. Bearing in mind that the Supreme Court of Arkansas concluded that a sales tax would be a burden on interstate commerce for the tax to be imposed and collected under the facts in this case, Respondent urges first; that the determination of the case by the Arkansas Supreme Court was not on a Federal question; second, if a Federal question was decided no conflict with the decision is established by prior decisions of this Court; and third, if a Federal question was decided it was not necessary to the determination of the cause.

ARGUMENT.

In order that we may reconcile holdings of the Arkansas Supreme Court with the decisions of this Court, it is important that the following facts be restated for the Court's convenient reference: (R-22-23).

(1) Respondent is a foreign corporation.

(2) Respondent is not authorized to do business in Arkansas.

(3) Respondent has no offices, warehouses nor property situated in Arkansas.

(4) Orders procured by respondent's salesmen do not become final contracts until signed by Respondent in Tennessee.

(5) Orders are filled and shipped FOB Memphis, Tennessee.

DETERMINATION OF THE CASE BY THE ARKANSAS SUPREME COURT WAS NOT ON A FEDERAL QUESTION.

The Supreme Court of Arkansas in concluding the case stated:

> "(1) That the tax here involved is a sales tax; and (2) that as a sales tax it would be a burden on interstate commerce for the tax to be imposed and collected under the facts in this case." (R-28).

In the case of *Joseph D. McGoldrick v. Gulf Oil Corporation*, 309 U. S. 2-3, 84 Law Ed. 536, this Court pointed out that for a State Court or a Court of Appeals to determine a case on question of Federal Law it must explicitly so state.

> "In the absence of an explicit statement by the Court of Appeals that it annulled the assessment of the tax solely because of violation of the Federal Constitution, we are unable to find that the decision of the highest Court of the State did not rest upon an adequate non-Federal ground. Judicial Code, par. 237 (b), 28 USCA, PAR. 344 (b). *Lynch v. New York*, 293 U.S. 52, 79 L. ed. 191, 55 S. Ct. 16; *Honeyman v. Hanan*, 300 U.S. 14, 81 L. ed. 476, 57 S. Ct. 350; *New York v. Central Savings Bank*, 306 U.S. 661, 83 L. ed. 1058, 59 S. Ct. 790."

We refer to the case of *James Stewart & Company v. Katherine Sadrakula*, 309 U.S. 94-105, 84 L. ed. 596.

In this connection Respondent maintains that the Arkansas Supreme Court in passing on the case was merely construing the application of Acts 154 of 1937 as amended and 386 of 1941 rather than concluding that the Acts were void as being repugnant to the Constitution of the United

States. It is unnecessary to cite the long line of decisions of this Court holding that a Federal question is not presented when a State Court merely construes its own Acts.

IF A FEDERAL QUESTION WAS DECIDED NO CONFLICT WITH THE DECISION IS ESTABLISHED BY PRIOR DECISIONS OF THIS COURT.

The Supreme Court of Arkansas, in passing on the within case, *McLeod v. J. E. Dilworth Co., et al*, 171 S. W. 2d (No. 1, June 15, 1943), page 62, because of the extreme importance attached to its former decision in *Mann v. McCarroll*, 198 Arkansas 628; 130 S. W. (2d) 721, first reconciled its conclusions therein enumerated with the present case. It was first concluded that Act 154 of 1937, which was before the Court in *Mann v. McCarroll*, supra, did not impose a use tax and the sales tax levied thereby was void under the Commerce Clause of the Constitution of the United States insofar as the transactions therein were concerned. It is further stated that the facts in the present case are substantially the same so far as interstate commerce characteristics are concerned, as in the *Mann*, supra, case. It is well to point out at this time that the present case is an attempt to revive the validity of Act 154 of 1937, which was directly settled by the principles announced in *Mann v. McCarroll*, supra, and, as well to validate the provisions of Act 386 of 1941 as applied to out-of-state transactions. Petitioners support such effort upon the theory that this Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33; 84 Law Ed. 565, and companion cases overruled the *Mann*, supra, case and introduced new law in respect to interstate commerce.

Berwind, in *Berwind-White Coal Mining Co.* case, supra, was a Pennsylvania Corporation engaged in mining coal in said State, but it maintained a sales office in New York City through which means orders were taken for delivery of coal within the city. Sales contracts were actually completed with its New York customers within the taxing area and deliveries were actually made by Berwind within New York City. Thus, it is readily seen that factually the case is wholly dissimilar to the within case. In fact, this Court has always held that because tangible personal property might have at one time been in interstate commerce it could not be relieved of its share of State Tax burdens after commerce had ceased. This is a logical and reasonable construction. No doubt a great percentage of property sold locally in Arkansas was at one time in commerce. Therefore, if a view contrary thereto were established, the State of Arkansas would find very few transactions involving the sale of tangible personal property which would be strictly subject to a sales tax. The Arkansas Supreme Court, in reviewing the *Berwind-White Coal Mining* case, supra, stated:

> "It is our conclusion that the Berwind-White Coal case does not go as far as the appellant contends, and that it introduces no new feature into the law regarding interstate commerce as previously declared. In the Berwind-White Coal case there was involved a retail sales tax of New York City. The Berwind-White Coal Mining Co., a Pennsylvania Corporation, was engaged in the production of coal from its mines in Pennsylvania, and it sold the coal to customers and dealers. It maintained a sales office in New York City. All the sales contracts with the New York customers involved in that case (with two exceptions not germane) were entered into in New York City and required delivery of the coal by the Berwind-White Coal Mining

Company to purchasers in New York City. In other words, there was a place of business in New York City and a delivery in New York City; and, therefore, the tax of New York City was upheld. The United States Supreme Court, speaking by Chief Justice Stone, said:

" 'The like taxation of property shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use or withdrawal for use by the consignee after the interstate journey has ended is not precluded.'

"'The distinguishing point between the Berwind-White Coal case and the cases at bar is that in the Berwind-White Coal case the corporation maintained its sales offices in New York City, took its contracts in New York City and made actual delivery in New York City; whereas, in the cases at bar, the offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey. The rule still obtains that in cases of this type, delivery to the carrier is delivery to consignee. We hold that the Berwind-White Coal case affords the appellant no ground for seeking an over-ruling by this Court of *Mann v. McCarroll.*"

This Court, in passing on the *McGoldrick v. Berwind*, supra, case, pointed out that the tax was conditioned upon a local activity delivery of goods within the State and that such an activity which, apart from its effect on commerce, is subject to the State taxing power. In other words, Berwind could not avoid the tax on coal sales, the contracts for which were completed in New York City, which were delivered by a common carrier from Pennsylvania direct

to Berwind's customers in New York City, while other sales made by Berwind by delivering from its local inventory or coal supply are plainly taxable beyond any question. Such logic is plainly in line with the holding of the Arkansas Supreme Court. Berwind was in business in New York City and actually made the local deliveries. The Arkansas Supreme Court directly ruled on this question involving the same Tax Act as herein involved, namely, Act 154 of 1937, and announced that the taxpayer, if a local or legally authorized vendor corporation, could not escape the tax even on merchandise shipped from its source of supply in another State direct by common carrier to its customers. In this case, *Hollis & Company v. McCarroll,* 200 Ark. 523, appellant was an Arkansas Corporation. It had procured an order in Arkansas for merchandise which was not carried in stock. This order was filled by appellant by ordering from a manufacturer in another State, the merchandise being shipped direct by the non-resident to the appellant's customer. The customer was not obligated to the non-resident shipper. The Arkansas Supreme Court points out that the contract of purchase was made in the State of Arkansas by an Arkansas corporation and the transaction was completely consummated within the State. A comparison of the holding in this case with that of *McGoldrick v. Berwind-White,* supra, obviously proves that the two Courts are in absolute harmony if a Federal question has been decided in the within case. In this respect, we urge that since this Court, in *McGoldrick v. Berwind,* supra, emphasizes the importance of local activity delivery, a foreign corporation not authorized to do business within the taxing area, with no offices or places of business and all deliveries made FOB, a foreign State could not in any sense of the word engage in local activity delivery.

In this respect we refer to the case of *Nelson v. Sears Roebuck & Company*, 312 U. S. 359; 85 Law Ed. 888, wherein Sears was held accountable for the Iowa Use Tax on its mail order business conducted therein. Sears actually maintained retail establishments or places of business in Iowa. The taxpayer, endeavored to distinguish its tax liability as applied to its local retail business from that of mail order business. It was also pointed out that there were other mail order houses doing business in Iowa by mail order only who were not required to pay the Iowa Use Tax, and to require them to do so would place a substantial burden upon Interstate Commerce and result in an impairment of the free flow of such commerce, to which this Court replied:

> "But those other concerns are not doing business in the State as foreign corporations."

Such reasoning is exactly the same as that established in *McGoldrick v. Berwind*, supra, and makes no distinction between sales and use taxes, but establishes local activity, as in this case, actually doing business within the State as the controlling element.

A review of other cases recently decided on use and sales taxes may be referred to for further authority, which are *McGoldrick v. Compagnie Generale Transatlantique* (1940) 309 U. S. 430; *Graybar Electric Company v. Curry*, 308 U. S. 513; and *Nelson v. Montgomery-Ward & Company*, 312 U. S. 373.

Petitioner cites the case of *Illinois Natural Gas Company v. Central Illinois Public Service Company*, U. S. Supreme Court Reports, 314 U. S. 498, 505, 86 Law Ed. 371, calling attention to the fact that this Court has sustained a nondis-

criminatory tax on commodities shipped interstate on a sales contract, not on the ground that the delivery was not a part of interstate commerce, but because the tax imposed was not a prohibitive regulation or burden on that commerce. In support of this statement, this Court quotes the case of *East Ohio Gas Company v. Tax Commission*, 283 U. S. 465; 75 Law Ed. 1171. The *East Ohio Gas Company*, supra, case presents substantially these facts:

(1) Appellant was an Ohio Corporation engaged in the business of furnishing natural gas to its customers in said State.

(2) Gas sold by said Company was produced 25% from its Ohio wells and 75% from its West Virginia and Pennsylvania wells.

(3) Gas deliveries were actually made within the taxing area.

The case presents the question of the application of an excise or occupational tax applied to appellant's receipts from gas produced in West Virginia and Pennsylvania and transported interstate to Ohio. This Court pointed out that when the gas passed from its main distribution lines into its supply lines and is divided into many thousands of relatively tiny streams that the division of the gas is like the breaking of an original package after shipment in interstate commerce so that its contents could be treated and sold at retail. The following comment is noted:

> "It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitable for the service for which it is intended is not interstate commerce but a busi-

> ness of purely local concern exclusively within the jurisdiction of the State."

Thus, it is seen, as in the *Berwind-White Coal Mining* case, supra, since Commerce had ceased, the activities of a local corporation in the sales and distribution of such property could be taxed by local authorities. And, returning to the case of *Illinois Natural Gas Company,* supra, this Court, in sustaining a nondiscriminatory tax on the sale to a buyer within the taxing State on a commodity shipped interstate because the tax was not a prohibited burden on commerce had in mind local activities after commerce had ceased and such activities conducted by a corporation domiciled or authorized to do business within the taxing area.

Petitioner also cites the case of *Wiloil Corporation v. Pennsylvania,* 294 U. S. 169, 79 Law Ed. 838, in which case the Commonwealth of Pennsylvania applied a tax of 3c per gallon upon liquid fuels sold and delivered by distributors within the State. Appellant, a Pennsylvania Corporation, having its principal office in Pittsburgh, sold liquid fuels within the Commonwealth, but maintained that it was not accountable for the tax because the fuel sold to its customers within the State was shipped from another State for delivery in tank cars deemed original packages. We quote from Mr. Justice Butler (page 175):

> "Our decisions show that if goods carried from one State have reached destination in another where they are held in original packages for sale, the latter has power without discrimination to tax them as it does other property within its jurisdiction. . . . Deliveries to purchasers at destination were made in accordance with the terms of the sales. As interstate transporta-

tion was not required or contemplated, it may be deemed as merely incidental."

Thus, it is again seen that commerce had ceased and a local sale was consummated by a corporation having its principal place of business within the taxing area, which facts are wholly dissimilar to those now before this Court.

IF A FEDERAL QUESTION WAS DECIDED IT WAS NOT NECESSARY TO THE DETERMINATION OF THE CAUSE.

Bearing in mind that the transactions in question as presented to the Supreme Court of the State of Arkansas were consummated completely in the State of Tennessee, where delivery was made to a common carrier (which is delivery to the consignee), we believe, as urged in our Brief before the Arkansas Supreme Court that it was only necessary for the Court to decide the case on the ground that an Arkansas sales tax could not apply to such transactions and that if any State had the right of taxation it would be the State of Tennessee. A decision of this type unquestionably renders the determination of a Federal question wholly unnecessary. In the case of *Marian S. Honeyman v. Herbert G. Hanan,* 300 U. S. 14; 81 Law Ed. 476, we quote (page 18):

> "Before we may undertake to review a decision of the Court of a State it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest Court of the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause."

DeSaussure v. Gaillard, 127 U.S. 216, 234, 32 L. ed. 125, 132, 8 S. Ct. 1053; *Johnson v. Risk,* 137 U.S. 300, 306, 307,

34 L. ed. 683, 686; *Walter A. Wood Mowing and Reaping Mach. Co. v. Skinner*, 139 U.S. 293, 295, 297, 36 L. ed. 193-197, 11 S. Ct. 528; *Eustis v. Bolles*, 150 U.S. 361, 366, 367, 37 L. ed. 1111, 1112, 14 S. Ct. 131; *Whitney v. California*, 274, U.S. 357, 360, 361, 71 L. ed. 1095, 1098, 1099, 47 S. Ct. 641; *Mellon v. O'Neil*, 275 U.S. 212, 214, 72 L. ed. 245, 246, 48 S. Ct. 62; *Lynch v. New York*, 293 U.S. 52, 54, 79 L. ed. 191, 192, 55 S. Ct. 16.

Before closing we wish to call the Court's attention to the rulings of the Supreme Court of the United States as promulgated by order, dated October term, 1941, which amends paragraph 1 of Rule 12 and requires an applicant in petitioning this Court for an allowance of an appeal to first state the statutory provision believed to sustain the jurisdiction, said statement showing that the nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied on and shall cite the cases believed to sustain jurisdiction. Petitioner, on page 3 of Petition for Writ of Certiorari, states that the statutory provision which is believed sustains jurisdiction of this Court is Sec. 240 of the Judicial Code (28 USCA, Sec. 347). This provision relates to petitions for Writ of Certiorari to Circuit Courts of Appeals and Court of Appeals of District of Columbia, etc. Petitioner undoubtedly intended to follow Sec. 237 of the Judicial Code, amended, (28 USCA, par. 344). In this respect we urge that Petitioner also has wholly failed to show rulings of this Court which would bring the case within the jurisdictional provisions relied on.

CONCLUSION.

It is urged that the decision of the Supreme Court of Arkansas in the case of *Murray B. McLeod, Commissioner of Revenue of the State of Arkansas, v. J. E. Dilworth Company* merely construed Acts 154 of 1937 as amended and 386 of 1941 as being inapplicable to the facts presented by the within case and the validity of the Acts in question as being repugnant to the Constitution of the United States was not determined because the necessity of such a determination was unnecessary for a final adjudication. Even though a Federal question is properly presented, the decisions of this Court are entirely consistent with the decision reached by the Arkansas Supreme Court. Therefore, this Honorable Court should deny the petition for Writ of Certiorari to the Supreme Court of the State of Arkansas.

Respectfully submitted,

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